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No. 99-781

IN THE
Supreme Court of the United States

AVIS RENT A CAR SYSTEM, INC., *et al.*,
Petitioners

v.

OSCAR AGUILAR, *et al.*,
Respondents

On Petition for Writ of Certiorari to the California Supreme Court

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AND BOSTON COALITION FOR FREEDOM OF EXPRESSION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AND BOSTON COALITION FOR FREEDOM OF EXPRESSION AS AMICI CURIAE IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted in support of the Petitioners. By letters filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief.[1]

INTERESTS OF AMICI CURIAE

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights. Many of the cases in which CIR has participated have involved the First Amendment. E.g., Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). CIR believes that in recent years, governmental entities and courts have increasingly circumscribed fundamental First Amendment freedoms in the pursuit of political objectives such as racial sensitivity. The Boston Coalition for Freedom of Expression is an alliance of artists, educators, and citizens concerned about censorship, arts advocacy, and the right of all segments of society to be heard. This case is particularly important for *amici* because a majority of the California Supreme Court has upheld a content-based injunction restraining

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[1] This brief was authored solely by amici's counsel, not counsel for any party, and no one but the amici contributed to this brief.

constitutionally protected speech without applying the strict scrutiny standard of review mandated by this Court.

SUMMARY OF ARGUMENT

Petitioners seek review of the judgment of the California Supreme Court upholding a permanent injunction prohibiting John Lawrence, a supervisor for Avis Rent A Car System, Inc., from uttering in the workplace any of a list of judicially proscribed words that are "descriptive of" or "directed to" the national origin of Avis' Hispanic employees. A sharply divided California Supreme Court upheld the validity of such a "remedial" injunction because there had "been a judicial determination that the continued use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination." Aguilar v. Avis, 87 Cal.Rptr.2d 132, 980 P.2d 846, 848 (1999) (plurality opinion). Lawrence and Avis, both defendants, had been found liable in 1994 for the creation of a hostile work environment in violation of state law.[2]

Both the plurality and concurring opinions which upheld the injunction failed to apply the strict scrutiny standard of review that this Court has required in cases where a content-based prior restraint is sought on constitutionally protected speech. Instead, both opinions

[2] The record reveals that the parties conceded that the remarks at issue did not amount to "fighting words," that Lawrence has not made any similar offensive remarks since 1992, and that only one of the original four prevailing plaintiffs remained employed by Avis in its San Francisco office. See Aguilar, 980 P.2d at 883 (Kennard, dissenting).

applied the content-neutral time, place and manner standards reserved for injunctions not targeted at the content of speech.

The injunction could not pass a strict scrutiny standard of review since it is not narrowly tailored to its goal of preventing harassment in the workplace. It reaches speech that would neither create nor constitute a hostile work environment under prevailing case law. It restrains the use of "offensive" words even if uttered on only a single occasion and outside the hearing of the remaining plaintiff the injunction is designed to protect. It sweeps within the ambit of its protective mantle Avis employees who are not even parties to this action. Finally, the entire premise behind the validity of the injunction is flawed since the very cases cited by the plurality and concurring opinion amply demonstrate that the use of a racial epithet cannot, by itself, revive a past hostile environment or create a new one.

The majority of the California Supreme Court incorrectly assumes that this Court's precedents support a content-based prior restraint on speech in the workplace in order to remedy employment discrimination resulting from a "hostile environment." This issue has never been squarely addressed by this Court and would therefore be a case of first impression if *certiorari* were granted. Allowing the California Supreme Court's judgment to stand uncorrected would have a far-reaching and damaging impact. Amici urge this Court to grant the writ so it can consider and correct the important First Amendment Implications of that judgment.

ARGUMENT

I. Why This Court Should Grant The Petition

The issues raised in this case have importance extending far beyond the application of "hostile environment" law to the workplace. In the last decade, state and Federal courts have applied hostile-environment regulations to virtually every conceivable social and economic interaction in American society. Courts have applied "hostile environment" regulations to workplaces,[3] schools and universities, [4] public accommodations,[5] homes,[6] and even churches[7]. "Hostile environment" regulations have

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[3] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (workplaces) (hostile work environment claim under Title VII).

[4] Davis v. Monroe County Board of Education, 119 S.Ct. 1661 (1999)(peer harassment claim under Title IX).

[5] D'Amico v. Commodities Exchange, 652 N.Y.S.2d 294 (N.Y. App. 1997) (patrons who contribute to "hostile public accommodations environment" are jointly and severally liable under New York law along with the public accommodation). See also Robyn Blumner, PC Posse Ropes in Satire, Washington Times, Sept. 25, 1999, at A12 (an anti-affirmative action column in faculty newsletter launched "hostile public accommodations environment" proceedings against a teachers' union at Chicago's City College by Chicago Commission on Human Rights).

[6] DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996) (Federal Fair Housing Act).

[7] Bollard v. The California Province of the Society of Jesus, __ F.3d __, 1999 WL 1076222 (9th Cir. Dec. 1 1999)

also been applied to any adjacent public fora such as a sidewalk abutting a workplace,[8] and the Internet.[9] Under the plurality and concurring opinion's reasoning, all of these places can now be subject to permanent injunctions on the communication of "offensive" speech. As Justice Brown noted in her dissenting opinion, "if applied generally, the plurality's rule would create the exception that swallowed the first amendment." See Aguilar, 980 P.2d at 893 (Brown, J., dissenting).

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[8] Baliko v. Stecker, 645 A.2d 1218, 1223 (N.J. App. 1994) (speech on public street and sidewalk around workplace -- vulgar speech by union picketers -- created sexually hostile work environment, for which individual picketers were potentially liable under the New Jersey Law Against Discrimination).

[9] See Kavanagh v. Goddard College, Charge No. PA99-0002 (Vt. Hum. Rts. Comm'n, March 10, 1999) (Internet access provider liable to subscriber for anonymous messages on Internet); Volokh, Freedom of Speech in Cyberspace From the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex, 1996 U. Chi. Legal F. 377, 419 (1996)(enumerating state public accommodations laws that may restrict speech on the Internet); Biegel, Hostile Connections, L.A. Daily J. at 7 (Aug. 22, 1996)(cyberspace law scholar advocates that the "embattled Internet decency law" struck down in Reno v. ACLU, 117 S.Ct. 2329 (1997) be effectively replaced, and extended to hate speech, simply by applying hostile environment principles to the Internet).

II. As A Content-Based Prior Restraint On Constitutionally Protected Speech, The Aguilar Injunction Must Be Subjected To, And Rejected Under, A Strict Scrutiny Standard of Review

There can be no question that the injunction in question is a content-based restriction on constitutionally protected speech. This Court has repeatedly held that even "virulent ethnic and religious epithets" constitute protected speech. See United States v. Eichman, 496 U.S. 310, 318 (1990); Lewis v. New Orleans, 408 U.S. 913 (1972)(limiting the reach of the fighting words doctrine); Gooding v. Wilson, 405 U.S. 518 (1972) (same). The injunction's content-discrimination is clear from this Court's ruling in Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992), which emphasized that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." Id. at 134.[10] Since, as the opinions below conceded, the injunction at issue in this case targets "`[t]he emotive impact of speech,'" Aguilar, 980 P.2d at 854-55 n.4, it is "not content-neutral." Id. at 874 (Werdegar, J., concurring).

Since the early part of this century this Court has held that even under circumstances where a damages remedy would be appropriate to punish speech, a content-based prior restraint on constitutionally protected speech is inappropriate. E.g., Near v. Minnesota, 283 U.S. 697 (1931) (defamation -- an unprotected category of speech that can be the subject of a lawsuit -- nevertheless cannot be enjoined); See also New York Times Co. v. United States, 403 U.S. 713 (1971)

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[10] See also DeAngelis v. El Paso Municipal Police Officers' Ass'n, 51 F.3d 591, 596-97 (5th Cir. 1995), cert. denied, 516 U.S. 974 (1995) (Hostile-environment harassment law imposes "content-based, viewpoint-discriminatory" restrictions on speech).

(disclosure of documents damaging to national security generally cannot be enjoined).

This Court has also held that any regulation of speech based upon its topic or viewpoint is a content-based restriction and is therefore subject to strict scrutiny and a strong presumption of invalidity. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 762-763 (1994). The proponent of a content-based restriction bears the burden of showing both that the restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Ed. Assn. v. Perry Local Educator's Association, 460 U.S. 37, 45 (1983); see also Madsen, 512 U.S. at 763-764. The Aguilar injunction -- which prohibits specified words that are descriptive of or directed to the national origin of the remaining plaintiff -- is clearly content-based. See AIDS Action Committee v. MBTA, 42 F.3d 1, 8 (1st Cir. 1994)("a regulation which . . . disallows the use of certain words in expressing [an] idea is content-based"). Moreover, as an injunction, it is subject to the even higher standard of scrutiny this Court applies to prior restraints,[11] which are invalid even when a content-

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[11] "Permanent injunctions . . . are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). "Obviously, if a court enjoins speech, there is a prior restraint of that speech." Nowak, Rotunda, and Young, Constitutional Law Sec. 744 at 5529 (1978). Prior restraints include any "content-based restriction on speech prior to its occurrence," Northeast Women's Center v. McMonagle, 939 F.2d 57, 63 (3d Cir. 1991), as well as certain content-neutral restraints. See Beal v. Stern, 184 F.3d 117, 124 (2d Cir. 1999).

based restriction might otherwise be permissible under strict scrutiny.[12]

It is a fundamental principle of First Amendment jurisprudence that an injunction cannot be upheld if the harm it is trying to prevent is only speculative. For example, in New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam), this Court rejected the government's claim that its paramount interest in national security allowed it to prevent publication of the "Pentagon Papers." The justices reasoned that the government failed to show that disclosure of the Pentagon Papers "will surely result in direct, immediate, and irreparable damage," id. at 730 (Stewart, J., joined by White, J., concurring), since "[t]he entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." Id. at 725-26 (Brennan, J., concurring) (emphasis added).

Yet the injunction at issue in this case prohibits the communication of a list of judicially proscribed "offensive" words that can only be selected on the basis of rank speculation that the words, and the ideas they convey, might contribute to a hostile environment in the future. For example, the injunction is premised on the court's speculation that there is a "substantial risk" that the plaintiff might learn second-hand about an epithet, become offended

[12] See, e.g., Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1975)("Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.").

by it, and thereby be subjected to a hostile environment. See Aguilar, 980 P.2d at 862 (plurality opinion)("It certainly is possible that the use of racial epithets even outside the hearing of plaintiffs would contribute to an atmosphere of racial hostility").

The plurality and concurring opinions employ the time-place-manner standard of Madsen v. Women's Health Center, 512 U.S. 753 (1994), a lesser level of scrutiny targeted at content-neutral restrictions. Unlike the strict scrutiny standard applicable to content-based restrictions, the content-neutral Madsen standard permits the government to speculate as to the effects of speech in the future.

This Court has consistently refused to speculate about future harm when reviewing the validity of content-based prior restraints on constitutionally protected speech. Prohibiting speech out of speculation that it may contribute to a hostile environment cannot possibly be the least restrictive means of preventing a hostile environment when there is already a more narrowly tailored civil damages remedy available if an actual hostile environment actually arises. In applying the less demanding time, place and manner standard of review associated with a content-neutral restraint on constitutionally protected speech, the plurality and concurring opinions implicitly concede that the injunction -- which bans even single utterances outside the earshot of the plaintiff -- is not so narrowly-tailored as to meet the requirements of strict scrutiny and overcome the presumption of invalidity.

III. The Record Before The California Supreme Court Did Not Demonstrate The Necessity Of A Content-Based Injunction Restraining Speech

Although the plurality, concurring and three dissenting opinions rightfully criticize the dearth of a factual record on appeal, the appellate record was sufficient to review and strike down as unconstitutional the trial court's injunction as modified by the Court of Appeals.

The California Supreme Court conceded that both California and federal harassment law refuse to recognize a single epithet as conduct sufficient to create a "hostile environment," the legal test for actionable harassment.[13] Both the plurality and concurring opinions get around this problem by reasoning that once a hostile environment is created -- presumably through multiple epithets -- it can be brought back into existence at any time by a single epithet, even one uttered outside the hearing of the sole remaining plaintiff in Lawrence's workplace. The Court reasoned that the fact that a hostile environment cannot be created by a single epithet does not mean that it cannot be perpetuated by a single epithet once it already exists. See Aguilar, 87 Cal.Rptr.2d at

[13] Id., 980 P.2d at 862. See also Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2283 (1998) ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not sufficiently alter terms and conditions of employment to violate Title VII"), quoting Rogers v. E.E.O.C., 454 F.2d 234 (5th Cir. 1971)); Department of Corrections v. State Personnel Board, 59 Cal.App.4th 131, 149-50, 69 Cal.Rptr.2d 34, 45 (1997)(single profanity-laced verbal attack did not create hostile environment); Witt v. Roadway Express, 136 F.3d 1424 (10th Cir. 1996)(2 uses of the word "nigger" by supervisors did not create hostile environment).

151, 980 P.2d at 862 (plurality opinion) ("It certainly is possible that the use of racial epithets even outside the hearing of plaintiffs would contribute to an atmosphere of racial hostility that would perpetuate the hostile work environment created by plaintiffs.").

The problem with the Court's reasoning is that it is undisputed that the judicially determined "hostile environment" was based on conduct occurring no later than 1992, and thus it no longer exists. Under both Federal and California law,[14] the hostile environment is deemed to have dissipated by virtue of the passage of time.[15]

In addition, not only will a single use of a forbidden word by Lawrence not by itself create a hostile environment, there is no guarantee that it will even contribute to the potential development of a hostile environment. Nevertheless, by its own terms, the injunction would be violated even if the one remaining plaintiff did not know that Lawrence used the word outside his presence, or even if the plaintiff did learn about the use of the word but was not offended by it.

The requirement of "unwelcomeness" is an essential element of any harassment claim under both federal or state law. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). See also Brown v. Smith, 55 Cal.App.4th 767, 784, 64

[14] See Aguilar, 87 Cal.Rptr.2d at 139, 980 P.2d at 851 ("California courts have adopted the same standard in evaluating claims under the FEHA")

[15] See Avis's Petition for Writ of Certiorari at 13-14 (listing cases holding that isolated instances of harassment will not revive or perpetuate a hostile work environment that existed in a prior year).

Cal.Rptr.2d 301, 311-12 (Cal. App. 4 Dist. 1997). For example, Lawrence's use of a forbidden word would not constitute harassment, even if it did offend the plaintiff, if the plaintiff provoked Lawrence by calling him names first. In such a case, courts hold that the plaintiff could not show that the use of the word was objectively "unwelcome."[16] Thus, if Lawrence uses one of the judicially proscribed offensive words after being provoked by a string of epithets directed towards him by the Plaintiff, he is still subject to the court's discipline for violating the injunction even though his actions could not have constituted "unwelcome" harassment.

The injunction upheld by a majority of the California Supreme Court reaches speech which -- under the Plurality and Concurring opinions' own analysis of Federal and state hostile environment law -- could not possibly either create, perpetuate or even contribute to a hostile environment. The injunction reaches speech that the plaintiff will never hear about, speech that the plaintiff subjectively does not mind, and speech that the plaintiff objectively welcomes even if he minds it.

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[16] See, e.g., Scusa v. Nestle USA, Inc., 181 F.3d 958, 966 (8th Cir. 1999)(female employee who called male co-workers names was deemed to welcome name-calling in response); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 n.5 (9th Cir. 1994) ("an employee who regularly subjects her co-workers to sexually abusive language might effectively invite them to respond in kind"); 3 EEOC Compliance Manual N:4037, N:4039 n.10 (BNA 1990) (unwelcomeness has both objective and subjective elements).

This injunction is clearly not narrowly-tailored, even under the less stringent standard applicable to content-neutral speech restrictions. Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 122 n.* (1991) ("A regulation is not `narrowly tailored' . . . where . . . `a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals.'"). As this Court noted in NAACP v. Button, 371 U.S. 415, 438 (1963), "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

CONCLUSION

For the foregoing reasons, and as a case of first impression with potentially far reaching impact on the daily lives of millions of Americans, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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